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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking for Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	Rulemaking 06-10-005 (Filed October 5, 2006)

SCOPING MEMO FOR PHASE II AND REQUEST FOR COMMENTS; RULING ON NOTICE OF INTENT TO CLAIM INTERVENOR COMPENSATION

1. Introduction

Today's scoping memo and ruling address various matters remaining from the Phase I decision (Decision (D.) 07-03-014). Phase II is tentatively scoped as follows.

The major matter ripe for disposition appears to be the issue that the Commission reserved to this phase regarding build-out requirements. In addition, parties are invited to comment on whether the Commission should collect more information on broadband and video access and adoption. The Commission has already addressed or is in the process of addressing certain other matters, namely, the inadvertent omissions in the state video franchise certificate and out-dated wording in the complaint provision of the Commission's Rules of Practice and Procedure. On the other hand, the Commission's limited experience with the statute and uncertainty regarding future federal regulations precludes any useful guidance at this time about state video franchise renewals. Parties are invited to comment on this proposed scope of issues for Phase II.

Finally, the ruling responds to a notice of intent to claim compensation under the intervenor compensation statute. (*See* Pub. Util. Code Section 1801 *et seq.*) The Commission has already determined that it may not award intervenor compensation in a proceeding, such as this rulemaking, arising under the Digital Infrastructure and Video Competition Act of 2006 (DIVCA), Assembly Bill 2987 (Ch. 700, Stats. 2006). Intervenors are welcome to participate in this proceeding, but they should do so with the knowledge that their work is not compensable here.

2. Build-Out Requirements

Pub. Util. Code Section 5890(c), as construed in D.07-03-014, mimeo. p. 158, imposes build-out requirements on all state video franchise holders that, alone or in conjunction with their affiliates, have fewer than one million California telephone customers. The Commission clarified that it anticipated this requirement to have little or no impact on incumbent cable operators.[1] Thus, the Commission reserved to Phase II the development of standards to help smaller non-cable franchise holders demonstrate they would build out their networks within "a reasonable time."

Specifically, the Commission hoped to establish for this class of franchise holder two compliance mechanisms in Phase II: additional "safe harbor"

[1] As the Commission explained, "We interpret [the statute] to call for requirements only to the extent that a [holder] does not 'offer video service' to all of its *telephone* customers within its 'telephone service area.' If all of a [holder's] telephone customers have access to its video service (as is typically the case for incumbent cable operators), then we need not impose any further obligation on the holder." The Commission required such a holder to submit an affidavit of compliance with this condition. *See* D.07-03-014, mimeo. pp. 158-59 (emphasis in original).

standards; and an alternative whereby a franchise holder who does not meet any of the Commission's "safe harbor" standards may apply for a reasonableness determination based on that holder's unique circumstances.

Any further compliance mechanism developed in Phase II, whether of the "safe harbor" or case-by-case type, must be able to satisfy the Commission that the holder's build-out plan will meet the requirements of DIVCA. Thus, any party proposing a compliance mechanism in its comments should carefully review the Commission's discussion of build-out requirements, as set forth below (from D.07-03-014, mimeo. pp. 159-60), and formulate its proposal to respond to the Commission's articulated concerns:

> As indicated by requirements found in DIVCA, the design of build-out requirements is a fact-specific endeavor. The statutorily imposed build-out requirements are conditioned upon (i) the type of technology predominantly used by the state video franchise holder, (ii) the number of customers in the state video franchise holder's existing telephone service area, and (iii) the date when the state video franchise holder begins providing video service pursuant to DIVCA. Further, we can envision special circumstances (e.g., challenging terrain, long distances to potential subscribers' homes, and rights-of-way issues) that make it difficult for us to set uniform "reasonable" time frames.
>
> Our design of any build-out requirements will take into account policies and facts relevant to whether video service will be offered to customers "within a reasonable time." The design process will consider, among others, those policies and facts considered by the Legislature in its design of build-out requirements. Thus, our build-out requirements will be conditioned upon (i) the type of technology predominantly used by the state video franchise holder, (ii) the number of customers in the state video franchise holder's existing telephone service area, and (iii) the date when the state video franchise holder will begin providing video service pursuant to DIVCA. We also will consider whether it is prudent to include

> build-out safety valves, similar to those afforded to other state video franchise holders in Public Utilities Code § 5890(e)(3)-(4).
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> In establishing requirements, we will remain cognizant of the Legislature's guidance regarding provision of video service in high-cost areas. Pursuant to Public Utilities Code § 5890(c), we will not design any build-out provision that requires a state video service holder to offer video service when the cost of doing so is substantially above the average cost of providing video service in that telephone service area. We envision that application of this statute will require fact-specific inquiries as to costs of video service provision in areas where the state video service holder alleges that providing service is uneconomic.

Besides the concerns discussed above, the case-by-case compliance mechanism would apparently involve the Commission in significantly more complex fact-finding, compared to other DIVCA applications. Determining the completeness of an application should generally be short work; analyzing an applicant's unique circumstances, however, may reasonably require more time. Any party proposing a case-by-case compliance mechanism should address this timing issue.

3. Broadband and Video Access and Adoption Information

The Commission said it would consider in Phase II whether it needed "additional, more detailed broadband and video information for enforcement of specific DIVCA provisions." D.07-03-014, Ordering Paragraph 21. The context for this order is the discussion at page 141 of the decision. There, the Commission noted the express legislative intent to (i) promote widespread access to technologically advanced cable and video services, and (ii) complement efforts to increase investment in broadband infrastructure and close the digital divide. *See* Pub. Util. Code Section 5810(a)(2). The Commission also noted the legislative

expectation that holders will demonstrate "a substantial and continuous" effort to meeting build-out requirements. *See* Pub. Util. Code Section 5890(f)(4).

These statutory provisions are rather general, and the Commission may, or may not, already be collecting sufficient information to respond to them. Parties are invited to comment on the broadband and video access and adoption information currently being collected by the Commission under DIVCA. To the extent parties believe this information is adequate and responsive to the statutory provisions noted above, they should say so and explain why. To the extent parties believe the information is deficient, they should identify the deficiencies and analyze them. Careful explanation and analyses will be most welcome; broad generalizations will be accorded less weight.

4. Revisions to State Video Franchise Certificate

D.07-03-014 adopted and attached General Order 169, which contained the form of the state video franchise certificate to be granted to successful applicants. Through inadvertence, the adopted form did not include certain language specifically required by DIVCA. On our own motion, we modified D.07-03-014 to revise the certificate. We also authorized the Director of the Communications Division to prepare a resolution for our consideration to effect similar future changes to forms, as may be needed. *See* D.07-04-034.

Parties may submit comments in Phase II to draw our attention to any similar errors or omissions in the certificate or other attachments to D.07-03-014.

5. Amendment to Commission Procedural Rules

Before enactment of DIVCA, the Commission's complaint jurisdiction was set forth exclusively in Pub. Util. Code Section 1702. That statute authorizes us to hear only a complaint against a public utility. Rule 4.1 of our Rules of Practice and Procedure mirrors the statute.

DIVCA, however, enlarges the Commission's complaint jurisdiction. Specifically, under Pub. Util. Code Section 5890(g), the Commission (as the "state franchising authority") must hear a complaint brought by a local government against a state video franchise "holder," even though the latter, by express provision of DIVCA (Section 5820(c)) is not a public utility.

Commission staff believes the intent of DIVCA is clear and leaves no discretion regarding the implementation of Section 5890(g) in the Commission's rules. As such, on May 1, 2007, our Executive Director submitted to the Office of Administrative Law (OAL) a proposed amendment to Rule 4.1. This amendment is drafted to mirror the requirement of Section 5890(g) regarding local government complaints against state video franchise holders.

This submission to OAL was made pursuant to its regulation governing rules changes without regulatory effect. In this case, the change is one where the rulemaking agency has no discretion to adopt a change different from that chosen. See Calif. Code of Regulations, Title 1, Section 100(a)(6). OAL has 30 business days to review our proposal to change Rule 4.1 to implement Section 5890(g).

Commission staff has informally reviewed our other Rules of Practice and Procedure. Aside from Rule 4.1, there is no apparent incompatibility between DIVCA and our current rules. These rules therefore should remain fully applicable to DIVCA proceedings.

Parties may submit comments in Phase II on any other incompatibilities they have discovered, however, comments should be limited to changes needed in order to conform our rules to the requirements of DIVCA. Comments not so limited are beyond the scope of this proceeding.

6. Renewal of Video Franchises

General Order 169 did not include state video franchise renewal provisions; instead, consideration of franchise renewal was deferred to Phase II. D.07-03-014, mimeo. p. 211.

The same factors that led the Commission to defer the franchise renewal issue in Phase I suggest it is still not ripe. The earliest that a state video franchise may be renewed is 2017. During the period between now and 2017, the federal and state law applying to state video franchise holders may evolve significantly. Finally, there has been as yet almost no practical experience with DIVCA.

Thus, at this time, we believe it is premature to adopt principles or policies the Commission could establish regarding franchise renewal. Parties may submit comments on this finding, however. To the extent they believe any issue regarding franchise renewal is ripe for determination, they should specify it and explain why this issue is ripe and should be addressed now.

7. Notice of Intent to Claim Intervenor Compensation

On April 2, 2007, the Greenlining Institute (Greenlining) filed a notice of intent to claim compensation for its costs of participating in this proceeding. Greenlining cites our Rules of Practice and Procedure and Section 1801 *et seq.* of the Public Utilities Code as authority for its claim of compensation.[2] Greenlining does not mention the Phase I decision, D.07-03-014, where the Commission expressly held that intervenor compensation is not available "in a proceeding arising under DIVCA" Id., Ordering Paragraph 25.

[2] Greenlining's citation to Commission rules, however, is incorrect. The Commission completely re-codified the Rules of Practice and Procedure last year; Rules 17.1 - 17.4 now contain the procedures that apply to compensation for intervenors.

The Commission arrived at this holding after concluding (Conclusion of Law 147) that it lacked the statutory authority to grant intervenor compensation in the video services context. The Commission found that the statutes limited the intervenor compensation program to proceedings involving public utilities; that DIVCA expressly stated video service providers were not public utilities or common carriers; and that while a video service provider might also be a telephone corporation, this fact should not subject the video service provider to treatment differing from other providers with respect to the provision of video service. *See* D.07-07-014, mimeo. pp. 201-03.

Greenlining's notice of intent does not address the availability of intervenor compensation under DIVCA. Greenlining has applied for rehearing of D.07-03-014, however, and among other things has challenged the conclusions regarding intervenor compensation. The basis for Greenlining's challenge appears largely to be policy argument predicated on the novelty of video franchising for the Commission and on the legislative goals to promote access to advanced communications services and to "close the digital divide."[3]

As stated in D.07-03-014 (*see* id. at mimeo. p. 201) and reiterated here, the determination that intervenor compensation is not available under DIVCA follows directly from the Commission's reading of the statutes. The Commission may and does exercise its policy preferences where it has been statutorily authorized to use such discretion, but in regard to DIVCA and intervenor compensation it has been constrained by legislative directives. Unless the

[3] *See* Greenlining, application for rehearing, pp. 4-5. The Utility Reform Network has also applied for rehearing of D.07-03-014, challenging the determination of the intervenor compensation issue, among other things.

Commission modifies its earlier conclusions in response to the applications for rehearing, Greenlining's notice of intent must be rejected on the ground that neither Greenlining nor any other intervenors could be compensated for participation in this proceeding. Under these circumstances, other matters usually discussed in a ruling in response to a notice of intent are moot.

8. Schedule for Comments and Replies

Comments and replies are invited regarding the subjects set forth in the scoping memo only (sections 2 to 6 above). Comments shall be filed and served no later than May 31, 2007; replies shall be filed and served no later than June 15, 2007.

IT IS SO RULED.

Dated May 7, 2007, at San Francisco, California.

/s/ RACHELLE B. CHONG
Rachelle B. Chong
Assigned Commissioner

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a copy of the Notice of Availability to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the copy of the Notice of Availability is current as of today's date.

Dated May 7, 2007, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid